MAR 18 1957

JOHN T. FEY, Clerk

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 800

A. P. VAN METER, ET AL.,
Appellants,

VERSUS

JACK D. ABRAHAM, ET AL.,
Appellees.

MOTION TO DISMISS OF APPELLEE JACK D. ABRAHAM

C. W. SCHWOERKE,
Colcord Building,
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Attorneys for Appellee Jack D. Abraham.

March, 1957.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. FO 9-8780

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Supreme Court of the United States
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A. P. VAN METER, ET AL.,
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MOTION TO DISMISS OF APPELLEE JACK D. ABRAHAM

Appellee Jack D. Abraham moves the Court to dismiss this appeal under Rule 16(1)(b) of the Rules of this Court, on the ground that appellant, A. P. Van Meter, District Judge, has no personal interest in this litigation to sustain a right of appeal. *County Court* v. *State of West Virginia*, 208 U.S. 192; *Stewart* v. *City of Kansas City*, 239 U.S. 14; *Caffrey* v. *Territory of Oklahoma*, 177 U.S. 346; *Marshall* v. *Dye*, 231 U.S. 250. The other appellants, not being parties to the record have no right of appeal to this Court. *United States* v. *Jack*, 244 U.S. 379.

Appellants have tacitly admitted that they have no right of appeal to this Court as shown by their statement on pages 4 and 5 of Statement as to Jurisdiction.

C. W. SCHWOERKE,
Colcord Building,
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Attorneys for Appellee Jack D. Abraham.

March, 1957.

FILED
MAR 27 1957
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MOTION TO DISMISS OF APPELLEES

Oklahoma Employment Security Commission, and Dave Vandivier, Hugh L. Harrell, T. C. "Ted" Knoop, E. R. Burns and Tom Chesher, the members thereof, Bruton Wood, the Executive Director thereof, Mark Neumann, the Chief of Benefits thereof.

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MARCH, 1957.

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In The
Supreme Court of the United States

October Term, 1956

No. 800

A. P. VAN METER, ET AL.,

Appellants,

VERSUS

JACK D. ABRAHAM, OKLAHOMA EMPLOYMENT SECURITY COMMISSION, BRUTON WOOD, DAVE VANDIVIER, HUGH HARRELL, T. C. "TED" KNOOP, E. R. BURNS, TOM CHESHER and MARK NEUMANN, ET AL.,

Appellees.

On Appeal from the Supreme Court of the State of Oklahoma

MOTION TO DISMISS

Appellees, Oklahoma Employment Security Commission, and Dave Vandiver, Hugh L. Harrell, T. C. "Ted" Knoop, E. R. Burns and Tom Chesher, the members thereof, Bruton Wood, the Executive Director thereof, and Mark Neumann, the Chief of Benefits thereof,

move to dismiss the above-entitled case on the ground that the questions presented in appellants' Statement as to Jurisdiction herein are so unsubstantial as not to warrant further argument.

STATEMENT

This is an appeal from an order of the Supreme Court of the State of Oklahoma, entered on November 7, 1956, in Case No. 37396 therein, entitled *Jack D. Abraham et al., plaintiffs* v. *Honorable A. P. Van Meter, District Judge, Oklahoma County, Oklahoma, Oklahoma Employment Security Commission, Bruton Wood, Dave Vandivier, Hugh Harrell, T. C. "Ted" Knoop, E. R. Burns, Tom Chesher, and Mark Neumann, Defendants*, 303 P. 2d 434 (Advance Sheet, December 14, 1956), wherein the Supreme Court of Oklahoma construed the Oklahoma Employment Security Act and whether or not one section thereof [Section 216 (e) of Title 40, Oklahoma Statutes 1951][1], or the operation thereof, deprived the appellant herein, Aero Design & Engineering Company, of its property without due process of law, in violation of the "due process" clause of the Fourteenth Amendment to the Constitution of the United States. By such order, the Supreme Court de-

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[1] Said Section 216(e) of Title 40, Oklahoma Statutes 1951, is quoted, in full, at pages 7 and 8 of Appellants' Statement as to Jurisdiction herein.

cleared that such statute and the operation thereof did not violate such "due process" clause. A true and correct copy of the opinion of the Supreme Court of the State of Oklahoma in that case is appended to the appellants' Statement as to jurisdiction herein (page 23 *et seq.*).

ARGUMENT

It will be noted that, on the question of whether or not the employers had any property right in the unemployment compensation fund or would suffer injury by payments from that fund in accordance with the statute under attack herein, the Supreme Court of Oklahoma said:

> "The only issues presented herein have been settled to our satisfaction by *Abelleira* v. *District Court of Appeals, Third District*, (Cal.), 109 P. 2d 942, 132 A. L. R. 715."

On these points, the California court in the *Abelleira case* said:

> "*The employers seek to avoid the operation of the rule, however, by the contention that they would suffer irreparable injury* if the administrative hearing were permitted to proceed and its orders made effective without judicial interference at this time. The cases they cite are those dealing with rate orders of regulatory commissions, where the administrative body imposes a confiscatory rate on a public utility. Continued operation of the business at the rate imposed pending the appeal may in some instances be so unprofitable as to amount to a destruction of the business, and therefore a taking of property without

due process of law. The courts in these cases issue injunctions to stay the enforcement of the new rate until a final determination of its validity, in order to protect the constitutional rights of the petitioning utilities. *In brief, these decisions establish the right to equitable relief to protect the property rights of a petitioner from irreparable injury* immediately threatened by a void administrative act. The soundness of this proposition cannot be questioned, *but it has no relevancy here.*

"*What injury do the employers show?* They say that they will suffer in the event unauthorized payments are made to unemployed workers, because their accounts will be charged with such payments, and their reserve under Section 39 of the act will be thereby decreased, with the ultimate result that they may in 1941 pay contributions at an increased rate. *In examining this contention, we must remember just what the employers are trying to do. They are attempting to prevent payment of public funds in which they have no direct interest,* by a body specially charged with the duty of making such payment. We said in the *Bodinson Mfg. Co. case, supra,* that they are aggrieved parties entitled to demand judicial review. But the question here is not whether they are aggrieved to the extent necessary to gain standing on appeal or review. The question is whether the payment of benefits at this time constitutes such an immediate and irreparable injury as to warrant the drastic step of interfering with an uncompleted administrative proceeding, in defiance of an established rule of jurisdiction. To this question there are several decisive answers.

"In the first place, *their whole contention is purely speculative.* The maximum contribution which they can be required to pay under the statute is 2.07 per cent. This cannot be increased, and the extent of their possible injury would therefore be the loss of a hoped

for lower rate under the so-called merit rating provision of the statute. This provision enables employers with a favorable employment experience to obtain a slightly lower rate of contribution, when their account on the commission books shows an excess of contributions over benefits paid. See Secs. 39, 40, 41, St. 1935, p. 1233, St. 1939, p. 2147. But the narrow range in which the contribution rate fluctuates can be affected by a variety of circumstances and by numerous instances of unemployment. It cannot be determined at the present time whether this particular order of payment would, in the light of all the occurrences of the past year and any other period involved, actually result in a changed rate. See 88 Univ. Pa. L. Rev. 137, 142.

"Second, it is provided in Section 67 of the act that in the event that any payments of benefits are found to be erroneous the particular employer's account shall not be charged with them. *This being so, it is not clear how his contributions can be increased by the payments*, since the factor determining the rate is made inapplicable in such event." (109 P. 2d 942 at 951 and 952; emphasis supplied.)

Thus, it is patent that the Oklahoma Supreme Court, in the case at bar, by adopting such California reasoning, adopted the California declaration, above quoted, that the employers "have no direct interest" in such public fund, and, therefore held that the Oklahoma employers have no property right in the Oklahoma public fund, or other interest therein, and would not suffer any injury by reason of payments from the fund in accordance with the statute under attack (and held, consequently, that

employers would not be deprived of any property without due process of law, if such payments were made).

Therefore, under *Gange Lumber Co.* v. *Rowley*, 326 U. S. 295, 90 L. Ed. 85, wherein this Court said:

> "In view of these provisions and effects, *the State Supreme Court has declared that neither the employer nor the employee has a vested right or interest in the fund*; the moneys when collected are public moneys, held and administered by the state, albeit pursuant to the statutory purpose they constitute a 'trust fund' for the benefit of injured workmen and their dependents. The fund is therefore in no sense the private property of the employer. *Consequently the payment of the awards out of the fund in itself could not amount to a deprivation of the employer's property*, * * *" (Emphasis supplied)

the decision of the Supreme Court of Oklahoma, under attack herein, was manifestly correct on the federal aspects of the case.

It is true, as pointed out by appellants, that the highest courts of several other states have held that the employer in these states has a property right in such funds (and, consequently, that payments from the fund under somewhat similar statutes would deprive the employers of property without due process of law). However, it must be noted that, in each such case, the court was construing the provisions of the employment security act of its own state, and the Supreme Court of Oklahoma, in this case, has construed the Oklahoma statute and the

employers' rights, if any, thereunder. Consequently, those other cases are not in point herein, even on the constitutional question.

In a related case in the United States District Court for the Western District of Oklahoma[2] (also on appeal to this Court under Docket No. 801), wherein the plaintiffs asked to have the above mentioned section of the Oklahoma statutes declared violative of the "due process" clause of the Fourteenth Amendment to the Constitution of the United States, and to have the defendants enjoined from enforcing said statute, a three-judge federal court construed the opinion of the Supreme Court of Oklahoma in the case at bar, and held that, under the Oklahoma law, as construed by the Supreme Court of the State of Oklahoma in the case at bar, the petitioners (Aero Design & Engineering Company and a number of other employers who were allowed to intervene) "have no property or litigable interest in the Oklahoma unemployment compensation fund capable of constitutional protection," and dismissed that suit. A true and correct copy of that opinion is appended hereto and made a part hereof.

[2] No. 7297 therein, entitled "Aero Design & Engineering Company, a corporation, plaintiff, v. Oklahoma Employment Security Commission, and Dave Vandivier, Hugh L. Harrell, T. C. "Ted" Knoop, E. R. Burns, and Tom Chesher, all members thereof; Bruton Wood, the Executive Director thereof; and Mark Neumann, the Chief of Benefits thereof, defendants".

While the federal district court was not bound by the decision of the Oklahoma Supreme Court, as to federal aspects of the case, it was bound by the state court's interpretation of the state statutes involved. The federal court simply held that, in view of the Oklahoma Supreme Court's construction of the employers' rights under the Oklahoma Security Act, and this Court's decision in the *Gange Lumber Company case, supra*, the employers' constitutional rights would not be violated by the payments sought to be enjoined.

This decision of the three-judge federal court, as to the federal aspects of this case, is patently correct. Therefore, this decision of the Supreme Court of Oklahoma, on the federal aspects of the case, is equally correct, and it is manifest that the federal question presented by the appeal herein is so unsubstantial as not to merit further argument, and should be dismissed.

CONCLUSION

It is respectfully submitted that the appellants present no substantial question for the decision of this Honorable Court, and that the appeal from the order of the Supreme Court of the State of Oklahoma should be dismissed.

Respectfully submitted.

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MARCH, 1957.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF OKLAHOMA

Aero Design & Engineering Co., et al.	Plaintiffs	Civil Action
v.		No. 7297
Oklahoma Employment Security Commission, et al.,	Defendants.	

JUDGMENT DISMISSING ACTION

On this 28th day of December, 1956, this cause comes on for disposition before the undersigned judges of this Court, the parties appearing by their counsel of record. In conformity with the views expressed in the Court's memorandum opinion filed herein on this date,

IT IS ADJUDGED AND DECREED that this action is dismissed.

Upon announcement by plaintiffs' counsel of their intention to appeal to the Supreme Court of the United States and upon their request for a further restraining order pending such appeal,

IT IS ORDERED that the restraining order entered herein on November 7, 1956, is continued in force and effect during the pendency of plaintiffs' appeal to the Supreme Court of the United States, provided that

plaintiffs prosecute such appeal with diligence and dispatch.

ALFRED P. MURRAH,
Circuit Judge
STEPHEN S. CHANDLER,
District Judge
ROSS RIZLEY,
District Judge

KES:S.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF OKLAHOMA

AERO DESIGN & ENGINEERING CO., et al.,	Plaintiffs,	Civil Action
v.		No. 7297
OKLAHOMA EMPLOYMENT SECURITY COMMISSION, et al.,	Defendants.	

Before MURRAH, Circuit Judge, CHANDLER and RIZLEY, District Judges

MEMORANDUM
(Murrah)

This suit challenges the constitutionality of the so-called double affirmation clause of the Oklahoma Employment Security Act. 40 O. S. A. § 211 *et seq.* The Act provides for the payment of certain stipulated benefits to unemployed persons under prescribed conditions from a fund created by contributions of Oklahoma employers (§217); creates an Employment Security Com-

mission [§220(a)]; authorizes commission determination of eligibility for benefits according to statutory standards (§§214 & 215); provides for administrative review of commission determination by appeal tribune [§216(d)]; and further administrative appeal to a board of review [§216(d) (3)] with the right of judicial review from the administrative decisions on questions of law. [§216(d)(7)]; provided, however, that "If a determination allowing benefits is affirmed in any amount by an appeal tribunal, or is so affirmed by the Board of Review, or if a decision of an appeal tribunal allowing benefits shall be promptly paid regardless of any further appeal, and no injunction, supersedeas, stay, or other writ or process suspending the payment of such benefits shall be issued by the Board or any court but if such decision is finally reversed no employer's account shall be charged with benefits as paid pursuant to the erroneous determination and benefits shall not be paid for any subsequent weeks of unemployment involved in such reversal." [§216(e)].

Three-judge federal equity jurisdiction is based upon the constitutional issue, the requisite amount in controversy and the prayer for injunctive relief against the payment of the benefits after double affirmation pending judicial review in the state court. 28 U. S. C. A. §§ 1131, 2281. The requisite amount in controversy is challenged, but the object of the suit is to restrain the

commission from disbursing approximately $25,000 from the unemployment compensation fund. The disbursements are to be made to numerous persons for sums far less than the jurisdictional amount. But it is the value of the object of the suit which determines the amount in controversy, not the value to the individual beneficiaries. Ronzio v. Denver & R. G. R. R., 116 F. 2d 604; Boesenberg v. Chicago Title & Trust Co., 128 F. 2d 245; Miller v. Nat'l. City Bank of New York, 147 F. 2d 798.

The facts pertinent to the constitutional issue are that the respondents here are former employees of the petitioner, Aero Design & Engineering Co., who have been awarded benefits under the Oklahoma Security Act after double affirmation under Section 216. Before disbursements of the benefits by the Commission, petitioner enjoined the payments by an injunction in the Oklahoma County District Court, apparently on the grounds that the payment of the benefits pending judicial review amounted to a deprivation of the petitioner's property without due process of law. In an original action in the Oklahoma Supreme Court for a writ of prohibition to the judge of the trial court issuing the injunction, the State Supreme Court specifically held that the payment of the benefits under Section 216(e) pending judicial review did not deprive the petitioner company or those similarly situated of their property without due process

of law. See Abraham v. Van Meter, 27 O. B. A. J. 1787, decided November 10, 1956, ... P. 2d .....

The decision of the Oklahoma court is interposed as *res judicata* on the issues presented here. The petitioner secured the injunction in the state District Court for its own benefit. It appeared in the Supreme Court as counsel for the respondent trial judge and participated in the litigation throughout. Some of the parties appearing *amicus curiae* here also appeared in the same capacity in the Supreme Court asserting the same interest as contributors to the Oklahoma unemployment compensation fund.

It is firmly established that "a judgment recovered in an action is *res judicata* or conclusive, as to the issues adjudicated therein, in favor of or against a person, who, though not an actual party to the record in that action, prosecuted the action or the defense thereto, on behalf of a party, or assisted the latter or participated with him in the prosecution of such action or its defense, if the same issue should be raised again in a subsequent action between him and the adversary of the party to whom his assistance was given or with whom he cooperated." See Annot. 139 A. L. R. 9, 12, following Caterpillar Tractor Co. v. International Harvester Co., 120 F. 2d 82, 139 A. L. R 1

The petitioner and those appearing *amicus curiae* were undoubtedly the real parties in interest in the litiga-

tion The injunctive order was secured on their petition in their behalf and for their benefit. The trial judge was only a nominal party with no direct interest in the outcome of the litigation; as the real party in interest, the petitioner defended the extraordinary proceedings in the Supreme Court directed to the trial judge, participating at every step of the proceedings, and was undoubtedly bound by the decisions which dissolved the injunction and in effect ordered the payment of the benefits. At first blush, it would seem therefore that the state court proceedings are conclusive of the same issues presented here and we should not hesitate to apply the salutary doctrine intended to insure one full day in court, but no more. But here, a federal constitutional question is presented of which the Supreme Court of the United States is the final judge. A full day in court contemplates as a part of the judicial process a right to be heard in the court of last resort on the constitutional question. That right was not accorded or afforded in the state court proceedings for the simple reason that the state trial judge, being only a nominal party, had no right of appeal from the judgment of his superiors, and the petitioner here, not being a party to the record, was likewise denied a right of appeal. County Court v. State of West Virginia, 208 U. S. 192; United States v. Jack, 244 U. S. 397. It follows that the bar of *res judicata* usually applied in situations of this kind should be withheld.

The capacity or standing of the petitioner to maintain this suit is also challenged for lack of a litigable interest in the fund about to be disbursed. The contributions of the employers is said to create a public or *quasi* public fund for the benefit, which, while held for the account of the respective contributors, is maintained for the benefit of unemployed employees found entitled thereto; that the employer-contributors have no property right or interest in the fund, the deprivation of which would amount to a denial of due process of law. Of course the content or the nature of the employer-contributor's property interest in the fund is a matter of state law. But the question whether the deprivation or invasion of that state determined right amounts to a deprivation of due process of law prohibited by the Fourteenth Amendment is a question of federal law on which the federal decisions are controlling. Employer-contributors to the unemployment compensation funds under the provisions of uniform employment security acts have been held to be proper parties-plaintiff to contest the right of the commission to disburse unemployment benefits to former employees of employer-contributors pending judicial review of the administrative determination of the right to benefits in the states of Michigan, Indiana, Iowa and Pennsylvania. In Michigan and Pennsylvania, the capacity to maintain the suit on constitutional grounds was sustained as a contributor and therefore a

taxpayer and because the contributors' "own reserve account will be charged with the payment of any unemployment benefits that are made and its present contribution rate thereby jeopardized." Pennsylvania State Chamber of Commerce v. Torquato, 125 A. 2d 755. And see also Chrysler Corp. v. Appeal Board of Michigan Unemployment Compensation Commission, 3 N. W. 2d 302; State v. State, 57 N. E. 2d 433; Dallas Fuel Co. v. Horne, 300 N. W. 303. Those states also deny the constitutional power of the legislature to provide for the payment of the benefits pending judicial review and without supersedeas.

But, in the Abraham case, the Supreme Court of Oklahoma deliberately and specifically declined to accept the views of the courts which have sustained the employer's standing to sue and its constitutional right to supersedeas. In that case, the employers, including this petitioner, took the position that as employers and contributors to the unemployment compensation fund, they had a property right in it and an interest in seeing that it was used only for lawful purposes. The employer-contributors contended that inasmuch as the contribution rate of all employer-contributors to the fund was determined in a large measure by the prescribed state experience factor, and that such state experience factor was determined by the amount of benefits paid to employees, any increase in the benefits paid to such employees would

tend to increase the state experience factor with consequent increases in their rate of contribution to the fund.

These issues were settled to the satisfaction of the Oklahoma court by the California case Abelleira v. District Court of Appeal, 109 P. 2d 942, 132 A. L. R. 715. In that case, the California court held that the comparable California unemployment insurance act "fulfills each requirement of due process of law." Drawing a distinction between the Chamber of Commerce case in Pennsylvania, where capacity to sue was sustained, and the Abelleira case in California, where it had apparently been denied, the Oklahoma Court quoted from the California case, which pointed out that in the event "that any payments of benefits are found to be erroneous, the particular employer's account shall not be charged with them. This being so, it is not clear how a contribution can be increased by the payments since the factors determining the rate is made inapplicable in such event." The Oklahoma Court was thus of the view that the similar provisions in the Oklahoma Act operated to deny the employer a litigable right in the disbursement of the fund pending judicial review. But it did not stop there. It went on to say that the unemployment insurance fund did not suffer any ultimate loss or depletion indiscriminately in all cases by reason of the payment pending judicial review, because of the recovery and recoupment provisions in the Act, wherein the Commission is em-

powered to recover or recoup losses judicially determined to have been erroneously paid. The Oklahoma court thought this was another demonstrable distinction between its case and the Pennsylvania case where it was conceded that if the unemployment benefits were made to the claimants, they would never be recovered, the insurance fund would be depleted to the extent thereof with irreparable harm unless a supersedeas or injunction was granted.

It thus becomes undeniably plain that under Oklahoma law, the employer-contributors to the compensation fund have no property right or interest in the fund, the deprivation of which would amount to a denial of due process of law. And this view finds support in Gange Lumber Co. v. Rowley, 326 U. S. 295, where the Court held that employer-contributors to an industrial accident fund under Washington's Industrial Insurance Act, based upon individual and class experience cost factors had no vested interest in such fund which would entitle them to assert a constitutional right therein. Specifically, the Court did not think that the prospective increases in the contributions based upon increased cost factors was the proper subject of protection under the due process clause of the Fourteenth Amendment.

In view of the Oklahoma law, we are constrained to hold that the petitioners have no property or litigable interest in the Oklahoma unemployment compensation

fund capable of constitutional protection, and the suit is dismissed.